No. 4015.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Quong Duck,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

OPENING BRIEF FOR DEFENDANT IN ERROR.

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The plaintiff in error was indicted in the Northern Division of the Southern District of California, upon two counts for violation of the opium act.

The case was tried on November 27th, 1922, before the Honorable Oscar A. Trippet, district judge.

In the brief of the plaintiff in error there is no argument or contention that the evidence is not sufficient to support the verdict, that the court erred in its rulings on questions of law during the course of the trial or that the court erred in its instructions to the jury.

The only ground upon which the plaintiff in error relies is that the court made certain remarks to the jury which amounted to coercion, and that the verdict of the jury was the result of this coercion.

The remarks to which the plaintiff in error objects were made when the jury returned to the court room after having deliberated for one hour. The remarks were as follows:

"The Court: Gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have not, Your Honor.

The Court: How does the jury stand; I want to know just how you are divided, not as to your vote whether guilty or not.

The Foreman: The jury stands eight to four.

The Court: I don't understand, gentlemen of the jury, why a verdict has not been promptly returned in this case. You may retire to your chambers; I hope you will compose your differences, there ought to be a verdict reached in this case. Anything I can do to assist you, I will do it.

Whereupon the jury retires at 4:05 p. m. for further deliberation and at 4:20 p. m. returned with the verdict of not guilty on the first count and guilty as charged in the second count of the indictment." [Tr. pp. 55 and 56.]

ARGUMENT.

The plaintiff in error relies on the case of Burton v. U. S., 196 U. S. 283, 49 L. Ed. 482, and the case of Petersen v. U. S. 213, Fed. 920.

In the Burton case the court criticized the trial court for inquiring as to how the jury was divided and for the comments made by the court to the jury, but in the Burton case the comments of the trial court practically amounted to an insistence that the jury return some verdict. The remarks in the case at bar did not go that far. The Burton case, however, was not reversed because of these remarks by the court,

but was reversed on the ground that the court erred in refusing to give the jury certain instructions as requested by the defendant, and the court did not hold that these remarks were, of themselves, sufficient to warrant a new trial.

The plaintiff in error quotes two paragraphs from the decision in the Burton case. (Brief of Plaintiff, p. 3.) These paragraphs are correctly quoted, but the first paragraph quoted did not immediately precede the second paragraph quoted and did not relate to it, but related to the refusal of the trial court to charge the jury as requested by the defendant.

In the Petersen case, the language of the trial court which was criticized in the opinion, went much further than the language of the trial court in this case. Also the Petersen case was reversed on the ground that the court misdirected the jury as to the construction of the statute involved in that case and the court did not hold that the remarks complained of were, of themselves, sufficient grounds for a new trial.

The plaintiff in error has cited no case and we have found none which holds that language similar to that used by the trial court in this case is, of itself alone, sufficient ground for a new trial.

In this case the court did not express an opinion as to the guilt or innocence of the accused and there was nothing in the language used to indicate what verdict the court desired.

In the recent case of Brolaski v. U. S., 279 Fed. 1, this court expressly held that the expression by the

court, after the jury had deliberated for some time, that a verdict should be returned, was not reversible error.

This question is also discussed in:

Hyde v. U. S. 225, U. S. 347, 56 L. Ed. 1114;

Campbell v. U. S., 221 Fed. 186, 136 C. C. A. 606;

Suslak v. U. S., 213 Fed. 913.

It is conceded that the court should not coerce the jury into returning a verdict, but the language used by the court in this case was not coercive.

The expression of a hope that the jury would compose their differences and the statement that a verdict should be reached is nothing more than is expressed in one way or another in nearly every charge to a jury. Every juror knows that a verdict should be reached in every case, and that the court always hopes that the jurors will compose their differences.

The transcript does not contain the court's charge to the jury and in its absence we must conclude that the court fully and correctly charged the jury as to their duties and responsibilities and as to the law of reasonable doubt, as well as to all other matters involved in the case.

It is respectfully submitted that the case at bar should be affirmed.

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